

Journal of Air Law and Commerce

Volume 38 | Issue 3

Article 9

1972

The Effect of the Federal Pre-Emption of Noise Control and Air Pollution on Local Initiative: Can Prometheus Be Unbound

Michael Stein

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Michael Stein, *The Effect of the Federal Pre-Emption of Noise Control and Air Pollution on Local Initiative: Can Prometheus Be Unbound*, 38 J. AIR L. & COM. 427 (1972)
<https://scholar.smu.edu/jalc/vol38/iss3/9>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

The Effect of the Federal Pre-Emption of Noise Control and Air Pollution on Local Initiative: Can Prometheus Be Unbound?

Although there is unanimity among local and federal authorities lauding endeavors to protect the environment, differences have arisen concerning the method and the timing of these endeavors. Local authorities attempting to protect their environment sometimes find to their chagrin, that the federal government has initiated procedures designed to provide solutions for local problems. If the federal action demonstrates the requisite intent to preclude local initiative, local action is pre-empted¹ and local authorities must rely on the federal solution, however ineffective they believe it may be.

If a field is pre-empted, local legislation may neither conflict with,² nor supplement³ the federal law. Areas of law, however, while apparently pre-empted, may not be completely under the federal pre-emption umbrella. Local legislatures seeking their own solutions can avoid the restraints of less than total pre-emption by first determining the breadth of the federal legislation, and then by drafting statutes that operate in the open areas not protected by federal laws. While this approach does not guarantee success, there is a basis for arguing that properly framed local legislation is permissible.⁴

¹ When dealing with the subject of pre-emption, "[t]he question in each case is what [was] the purpose of Congress. . . . We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946) *citing* *Napier v. Atlantic Coastline R.R. Co.*, 272 U.S. 605, 611 (1926) *and* *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942). The requirement that there must be a clear congressional manifestation of intent for pre-emption to result from federal legislation has often been noted by the Supreme Court. *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933); *Reid v. Colorado*, 187 U.S. 137, 148 (1902).

² *Napier v. Atlantic Coastline R.R. Co.*, 272 U.S. 605, 611 (1926).

³ *Campbell v. Hussey*, 368 U.S. 297, 308 (1961).

⁴ *See* *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1959) *but see* *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1950).

I AIR POLLUTION CONTROL

In *Chicago v. General Motors*⁵ the city of Chicago attempted to maintain a class action on behalf of its residents to force automobile manufacturers to install anti-pollution devices.⁶ Although the court denied relief on procedural grounds,⁷ the dictum of the opinion has far reaching implications. The court noted that recently enacted federal legislation pre-empts the new car field⁸ but does not cover older model automobiles.⁹ Nevertheless, the court abstained from adjudicating issues involving older automobiles because "the Chicago area has been designated an air quality control region . . . for which pollution standards and enforcement programs are being considered in a cooperative state and federal program. . . ."¹⁰ The court quipped that while the joint federal and state program may not be moving as fast as Chicago officials would like, guidelines have been set.¹¹ Therefore, the court concluded that it would be improper to interfere by exercising equitable jurisdiction in a virgin area of law, which first should be explored by state courts.¹²

If *Chicago v. General Motors* indicates that the courts will not exercise equitable jurisdiction in the automobile air pollution field, local government might, as an alternative, seek relief at law. To succeed in legislatively combating automobile pollution local governments must restrict the scope of their enactments to the hiatus not covered by the federally pre-empting legislation. In this instance the federal legislation affects only automobiles;¹³ "new" is limited to cars that have not been sold on the retail level:

The term "new motor vehicle" means a motor vehicle the equitable

⁵ 332 F. Supp. 285 (N.D. Ill. 1971).

⁶ *Id.* at 288.

⁷ The court held that the city of Chicago did not adequately represent the class it purported to represent. *Id.*

⁸ *Id.* at 290 citing 42 USC 1857f-6(a). See n.13 *infra*.

⁹ *Id.* at 291.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 290-91.

¹³ 42 U.S.C. § 1857f-6(a) (1970). "No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles. . . ." New automobile engines are also covered by the legislation, but references to them have implicitly been included in the discussion of new automobiles.

or legal title to which has never been transferred to an ultimate purchaser¹⁴ . . . The term "ultimate purchaser" means with respect to any new motor vehicle . . . the first person who in good faith purchases such new vehicle for purposes other than resale.¹⁵

Moreover, the legislative history of the Act clearly indicates that a restrictive construction of the word "new" was intended.¹⁶ Since the federal pre-emption covers only new cars, local authorities must limit their statutes to automobiles that have been sold; thereby dealing with automobiles that are by federal legislative definition no longer new and consequently, outside the pre-emption umbrella. By avoiding the purview of the federal statute, local governments will then be able to take the police power action they deem necessary to protect their environment, without federal interference.¹⁷ For example, local governments could require all resident automobile *owners* to install anti-pollution devices on autos to be operated within the jurisdiction.¹⁸ Consumer pressure might then

¹⁴ 42 USC § 1857f-7(3) (1970).

¹⁵ 42 USC § 1857f-7(5) (1970).

¹⁶ The legislative history of the Act provides that "[r]ather than leave this question to the uncertainties involved in litigation, the committee has agreed, with modifications hereafter discussed, to the provisions contained in the bill as passed by the Senate providing explicitly [208(a)] that State laws applicable to the control of emissions from *new* motor vehicles or *new* motor vehicle engines are superseded. The committee feels that a provision such as this is necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles." (emphasis added). 1967 U.S. Code Cong. and Admin. News, 1956.

¹⁷ 42 USC § 1857f-6a(c) (1970) "Nothing in this subchapter shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate or restrict the use, operation, or movement of registered or licensed motor vehicles."

¹⁸ *Washington v. General Motors Corp.*, 92 S. Ct. 1396, 99 at n.4 (1972). See N.Y. Vehicle and Traffic Law § 375.28-b (McKinney 1970) that provides:

Every motor vehicle registered in this state and manufactured or assembled after June thirty, nineteen hundred sixty-seven and known as a nineteen hundred sixty-eight or subsequent model shall be equipped with an air contaminant emission control system of a type approved by the state commissioner of health in accordance with standards promulgated by the air pollution control board of the state. Such system shall be maintained in good working order in continued conformity with standards promulgated by the air pollution control board of the state. For the purposes of this subdivision, "air contaminant emission control systems" may include, but shall not be limited to, exhaust control systems and gasoline evaporation control systems but shall exclude crankcase ventilating systems.

The administrative rule promulgated pursuant to this statute provides:

persuade the manufacturers to install the devices on all automobiles, either at the point of assembly or in the local dealers' showroom.

II. NOISE CONTROL

In 1968 the Federal government entered the airplane noise control field by amending the Federal Aviation Act of 1958. The amendment provides:

[T]he Federal Aviation Administration . . . shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations . . . to provide for the control and abatement of aircraft noise and sonic boom. . . .¹⁹

The legislative history explicitly refers to the pre-emptive character of the enactments.²⁰ Moreover, the cases that have encoun-

(a) All motor vehicles registered in this state and manufactured or assembled after June 30, 1967 and known as 1968 and subsequent models, except commercial vehicles over 6,000 pounds gross vehicle weight, shall be equipped with a means or system, approved by the Commissioner of Health, of limiting hydrocarbon and carbon monoxide in the exhaust during the life of the vehicle.

(1) Vehicles with an engine (or total piston) displacement of 50 cubic inches or more but not more than 100 cubic inches:

(i) Hydrocarbons—410 parts per million by volume.

(ii) Carbon monoxide—2.3 per cent by volume.

(2) Vehicles with an engine (or total piston) displacement greater than 100 cubic inches but not more than 140 cubic inches:

(i) Hydrocarbons—350 parts per million by volume.

(ii) Carbon monoxide—2.0 per cent by volume.

(3) Vehicles with an engine (or total piston) displacement greater than 140 cubic inches:

(i) Hydrocarbons—275 parts per million by volume.

(ii) Carbon monoxide—1.5 per cent by volume.

(b) The standards set forth in subdivision (a) above refer to a composite sample representing the number of vehicles and driving cycles as set forth in test procedures specified by the board and the commissioner.

2 BNA Environment Reporter, State Air Laws 461:0622 (1967).

¹⁹ Pub. L. No. 90-411 § 1, 82 Stat. 395 (1968). The grant of power to a federal agency is enough to establish pre-emption even if that power is not exercised. This link between pre-emption and administrative agency's inaction was established in *Napier v. Atlantic Coastline R.R. Co.*, 272 U.S. 605 (1926). The concept can be traced to *Welton v. Missouri*, 91 U.S. 275 (1875) where Congressional inaction was deemed to be the equivalent of a declaration.

²⁰ H. R. Rep. No. 1463, 90th Cong., 2d Sess. (1968). S. Rep. No. 1353, 90th Cong., 2d Sess. (1968). The Senate Report states:

The purpose of this bill is to authorize and require the Federal Government to establish and apply noise reduction standards to

tered airplane noise control regulation questions recognize an interplay between noise control ordinances and the authority of the F.A.A. to regulate flight patterns, another area pre-empted by federal legislation. For example, in *American Airlines Inc. v. Hempstead*,²¹ the Second Circuit held invalid a noise ordinance establishing minimum flight levels because the effect was to regulate flight patterns.²² At the time the pre-empting amendment was enacted, state and local public agencies acting as the "proprietor" of an airport had the power to establish permissible noise levels.²³ The amendment did not affect this power.²⁴ Nevertheless, in the *Opinion of the Justices*²⁵ the Supreme Court of Massachusetts advised the Massachusetts House of Representatives of the invalidity of a proposed statute that denied the use of airports located in the state to the supersonic transport and other commercial airplanes having noise levels, during takeoff and landings, above specified standards²⁶ because federal legislation²⁷ had pre-empted the field of aircraft noise control.

The predicate of the opinion is that the bill "purports to prevent non-conforming aircraft from landing and taking off *anywhere* in the commonwealth."²⁸ The court indicated that although Congress had not intended to restrict the right of state or local agencies,

the issuance of certificates under title VI of the Federal Aviation Act, and to prescribe and amend such rules and regulations as are necessary to provide for the control and abatement of aircraft noises . . . H. R. 3400 would merely expand the Federal Government's role in a field already pre-empted. It would not change this pre-emption. State and local governments will remain unable to use their police power to control aircraft noise by regulating the flight of aircraft.

Id. at 1.

²¹ 398 F.2d 369, 372-73 (2d Cir. 1968). *But see* *Williams v. Arizona Superior Court*, 12 Av. L. Rep. 17,528 (Ariz. Sup. Ct. 1972); *see also* *Loma Portal Civic Club v. American Airlines*, 394 P.2d 548 (Cal. S. Ct. 1964).

²² 398 F.2d at 376. *See* *Allegheny Airlines v. Cedarhurst*, 238 F.2d 812 (2d Cir. 1956), when the Second Circuit held invalid a city ordinance limiting take off and landing patterns at a nearby airport to a minimum of one thousand feet over the city. The court noted, "the federal regulatory system . . . has pre-empted the field below as well as above 1,000 feet. . . ." 238 F.2d at 812.

²³ *See* text accompanying note 19 *supra*.

²⁴ *Id.*

²⁵ 271 N.E.2d 354 (1971).

²⁶ *Id.* at 359.

²⁷ *Id.* at 358-59.

²⁸ *Id.* at 358.

as proprietors of airports, from issuing regulations pertaining to permissible aircraft noise levels, it now doubts the constitutional validity of state regulations controlling noise emanating from supersonic aircraft even if the legislation is framed in terms of airport proprietors.²⁹ This indecisiveness arose because the F.A.A. has issued notice of proposed noise control regulations with respect to supersonic aircraft.³⁰ The Agency's action, however, should not deprive local governments of the power to initiate regulation because in the enabling statute Congress did not manifest the affirmative intent requisite to pre-empt the field.³¹ Moreover, the Congressional intent, as the legislative history of the noise amendment indicates, was *not* to totally pre-empt the field:

[T]he proposed legislation will not affect the rights of the state or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. . . .³²

Since the legislation was intended to allow a degree of local initiative, it follows that the subsequent occupation of the field by a federal agency acting under that authority should not raise the presumption of total pre-emption. Once Congress manifests the intent not to pre-empt a field, a definitive Congressional statement to the contrary is required before the courts should infer a change in policy.³³

Thus, analyzing aircraft noise control solely in terms of pre-emption, the conclusion is that while a state may not enact legislation barring the Supersonic Transport, or other aircraft from taking off or landing *anywhere* in the state, it can prevent take offs and landings at airports where the state acts as the proprietor. Therefore, if local governments cooperate, an effective state-wide ban can be achieved.

III. THE COMMERCE CLAUSE

An analysis of state police power regulation, however, cannot be limited solely to the question of pre-emption. If a police power

²⁹ *Id.* at 357-58 citing 35 Fed. Reg. 6189, 16980, 12555.

³⁰ 35 Fed. Reg. 6189, 16980, 12555.

³¹ See note 1 *supra*.

³² S. Rep. No. 1353, 90th Cong., 2d Sess. 6 (1968).

³³ See note 1 *supra*.

enactment unduly burdens interstate commerce it is unconstitutional and will be declared void. Therefore, local regulations that affect interstate commerce must be examined to determine whether the degree of encroachment into the flow of commerce will be fatal to the statute.

Unfortunately there is no clear indicator to predetermine whether a local enactment is an undue burden on interstate commerce.³⁴ The Supreme Court has moved away from the early *zeitgeist* that precluded any examination of local police power regulations. The assumption then was that if the action is within the scope of proper police power regulation, questions of the reasonableness, wisdom, and propriety of the regulation should be debated in legislative chambers rather than in the courtroom.³⁵ This inflexible approach has subsequently been tempered. The Supreme Court has made it clear that, even in the absence of congressional action, a state may not deprive interstate commerce of needed "uniformity by simply invoking the convenient apologetics of police power. . . ."³⁶ Once the Court reappraised the situation and decided to examine the propriety of the regulation, a balancing process became necessary.³⁷ The thrust of the balancing approach is that the reasonableness of the enactment is no longer the sole criterion; instead the benefit accruing to the state, measured in terms of the actual benefit derived in relation to the overall effect on interstate commerce is the key.³⁸ While the balancing process is now required in state police, as well as non-police power regulations, a distinction must be made. When local police power is the source of a law that burdens commerce, the issue of whether the burden is undue will be afforded special consideration; the burden must be more excessive than in the case of non-police power regulation for it to be adjudged unreasonable.³⁹

In determining whether a noise control statute unreasonably burdens interstate commerce the issue stemming from the high cost

³⁴ *Colorado Anti-Discrim. Com'n v. Continental Air L.*, 372 U.S. 714, 719 (1963); *Lake Shore & Mich. So. Ry. Co. v. Ohio*, 173 U.S. 285, 308 (1808).

³⁵ *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 190-91 (1938).

³⁶ *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 780 (1945).

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1959).

of compliance must be considered.⁴⁰ The question would be whether the economic burden imposed is clearly excessive in relation to the putative local benefits.⁴¹ Assuming there is a legitimate local purpose, the question becomes one of degree. The extent of tolerable burden depends on the local interests involved.⁴² This requires a balancing of national priorities concerning efficiency and cost of aircraft operations against local environmental needs. The airlines would attempt to prove the amount of noise emanating from airplanes is negligible and therefore the cost of reducing the noise level is clearly excessive in relation to the putative local benefit. This argument could be countered by approaching the situation as the New Jersey court did in *Hanover v. Morristown*.⁴³ Relying on *Bibb v. Navajo Freight Lines*,⁴⁴ the court stated:

[T]he burden on interstate commerce is patently excessive only if the pattern of local legislation presents so acute a conflict that aircraft *cannot possibly comply* with all standards and continue interstate flight.⁴⁵

The New Jersey court also cited *Huron Portland Cement Co. v. Detroit*⁴⁶ when the United States Supreme Court upheld a Detroit criminal ordinance that predicated appellants' prosecution for emitting pollutants from its ship docked in Detroit harbor even though the ship was inspected, approved, and licensed to operate in interstate commerce by the federal government. The basis for the decision was that the federal standards were aimed at navigation safety, while the local regulation sought to protect the health of the community. The New Jersey court used *Huron* to illustrate a situation when ships could meet municipal standards only by effecting structural alterations and the Supreme Court found this burden was insufficient to invalidate the local legislation.⁴⁷

Another direction from which the interstate commerce question could be approached would be a showing of conflicting federal and

⁴⁰ See *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

⁴¹ *Id.*

⁴² See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁴³ 108 N.J. Super. 461, 261 A.2d 692 (1969).

⁴⁴ 359 U.S. 520 (1959).

⁴⁵ *Hanover v. Morristown*, 108 N.J. Super. 461, 261 A.2d 692, 701 (1969) (emphasis added).

⁴⁶ 362 U.S. 440 (1959).

⁴⁷ *Id.*

state laws.⁴⁸ In the automobile situation, local governments could show that there is no equivalent federal legislation for other than new automobiles; hence there can be no conflicting regulations for these vehicles. Local authorities could support this argument by citing *Huron* for the proposition that a state police power regulation that does not impose conflicting duties will not unduly burden interstate commerce and *Carter v. Virginia*⁴⁹ for the proposition that "regulation of interstate commerce by local authority in the absence of Congressional action is . . . [permissible] to protect the state from injuries arising from that commerce."⁵⁰ The basis for the latter argument is police regulation of local aspects of interstate commerce is often essential to protect local interests; until Congress chooses to enact a nation-wide rule, the power to protect itself will not be denied to the states.⁵¹ When a local enactment is found to substantially protect the citizenry, the *Carter v. Virginia* reasoning should control even though investigations concerning propriety are made.

While the determination whether a given statute burdens interstate commerce depends upon a basic question of fact concerning the degree of the burden, and although regulations seeking to protect the health and welfare of local citizenry are given special consideration, in the final analysis the weight of empirical evidence presented will be balanced with the necessity for uniform regulations. Hence while arguments can be made that the suggestions offered in this note should be deemed to unduly burden interstate commerce, precedents also indicate that these suggestions should be upheld. A future decision must, therefore, be decided on its own merits.

IV. PROGNOSIS

Although the fields of air pollution and noise control appear to be pre-empted, there is some latitude for obtaining public remedy on the local level. In the area of noise control, the *Opinion of the*

⁴⁸ Although conflict is not a prerequisite to proving burden, *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 3 (1928) when conflict is present, burden is more easily shown.

⁴⁹ 321 U.S. 131 (1944).

⁵⁰ *Id.* at 135, *accord* *Lake Shore & Mich. So. Ry. v. Ohio*, 173 U.S. 285 (1899).

⁵¹ *Freeman v. Hewit*, 329 U.S. 249, 253 (1946).

*Justices*⁵² indicates that if local government's environmental legislation is to be upheld, it must be carefully drawn; an overly broad statute will be declared invalid. It should be observed that while a town like Hempstead cannot directly stop the noise of jets from interrupting daily community life, New York City, as the proprietor of Kennedy Airport, can protect its own population from unnecessary noise. Of course, New York City is not likely to insist on noise level reduction to accommodate its neighbors in Hempstead. The neighboring city is therefore left without recourse unless tacit cooperation between local governments is achieved.

In the field of automobile pollution, the federal purview is strictly defined in terms of unsold cars; local governments can, and in fact are encouraged by Congress to create their own programs in fields where pre-emption does not apply.⁵³ The example provided by the dictum in *Chicago v. General Motors*⁵⁴ indicates that equitable relief will not be available in federal courts to force manufacturers to install anti-pollution devices on older cars even though they are not covered by the federal pre-emption. Legislation providing a remedy at law is a solution. Well drafted legislation, clearly delineating the scope of regulations and limiting it to areas not affected by federal laws, offers a realistic and workable opportunity for environmental regulation on the local level.

Michael Stein

⁵² 271 N.E.2d 354 (Mass. 1971).

⁵³ 1967 U.S. Code Cong. and Admin. News, 1939. The legislative history of the act clearly indicates the intent of Congress. "The bill would . . . preserve the rights of States, political subdivisions, and intermunicipal programs which will achieve a higher level of air quality than approved by the Secretary . . ."

⁵⁴ 332 F. Supp. 285 (N.D. Ill. 1971).